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VIOLATION OF LAW AS DEFENSE TO NEGLIGENT INJURY —SOUTHERN R. CO. v. VAUGHAN (VA.), 88 S. E. 305.

Question Stated and Explained.

The question as to whether or not the violation of a statute or ordinance is a good defense to an action for negligent personal injury happening at the time the person injured was engaged in the violation of such statute or ordinance, is one of no little importance; being one that may arise at any time. And we feel that the attention of the profession should be directed to the rulings of the courts on this subject.

In order that we may thoroughly understand the question in hand, let us consider for a moment the contention of the counsel for the defendant in the principal case. They contend, and very earnestly, that the automobile which was wrecked was being operated upon the highway without a license, and that the chauffeur was himself without a license; that the statute law of the state has prescribed in great detail regulations for the operation of automobiles and other vehicles whose motive power is other than animal power on the public highways of this state; and that the statute declares that it shall be unlawful for any person to operate any automobile, or other vehicle drawn and propelled by any power except animal power, on any public highway of the state, except and until such person shall comply with the provisions of the statute. Therefore, they say that the plaintiff was by his own conduct placed beyond the protection of the law and that he had no right of recovery.

The real question seems to be whether or not the law has created a duty to others or merely a public duty to be enforced in the ordinary administration of the criminal law, while civil rights and liabilities are left to be governed by general rules applicable in such cases, between parties one of whom has been guilty of a violation of law.[1]

1. Monroe *v.* Hartford, etc., Co., 76 Conn. 201, 56 Atl. 498; Frontier, etc., Co. *v.* Connolly, 72 Neb. 767, 68 L. R. A. 425, 101 N. W. 995;

Theory Based on Contributory Cause.

Majority Rule and Exceptions Stated.—The better rule seems to be that if the person injured was at the time of receiving the injury doing some act in violation of a statute,[2] or an ordinance,[3] such person cannot recover if such violation contributed to the injury; the violation being equal to contributory negligence.[4]

Exception to this rule has been made where the act, although a misdemeanor, was not an act which persons of ordinary prudence or moral sense would feel to be careless or morally wrong, or as involving a reasonable probability of injury,[5] and where the

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Cook *v.* Johnston, 58 Mich. 437, 55 Am. Rep. 703, 25 N. W. 388; Hayes *v.* Michigan C. R. Co., 11 U. S. 228, 239, 28 L. Ed. 410, 414, 4 Sup. Ct. Rep. 369; Atkinson *v.* Newcastle & G. Waterworks Co., L. R. 2 Exch. Div. 441; Dudley *v.* Northampton Street R. Co., 202 Mass. 443, 89 N. E. 25, 23 L. R. A., N. S.

2. Southern, etc., R. Co. *v.* Vaughan's Adm'r (Va.), 88 S. E. 305; Whitman *v.* W. & A. R. Co., 6 Can. L. T. O. C. C. Notes 457, 18 Nova Scotia 271; Devlin *v.* Bane, 11 U. C. C. P. 523.

3. Boschart *v.* Little, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33; Banks *v.* Highland Street R. Co., 136 Mass. 485; Weller *v.* Chicago, etc., R. Co., 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532 (this case was a violation of a speed ordinance); Galveston Land, etc., Co. *v.* Pracker, 3 Tex. Civ. App. 261, 22 S. W. 830.

"It has been too frequently held by this court that a violation of a statute or a municipal ordinance is per se negligence, and that if injury results to one while engaged in the prohibited act, and the doing of the prohibited act contributes to the injury, no recovery can be had. See Herries *v.* City of Waterloo, 114 Iowa, 374, 86 N. W. 306, and authorities cited; Healy *v.* Johnson, 127 Iowa, 221, 103 N. W. 92." Fisher *v.* Cedar Rapids, etc., Co. (Iowa), 157 N. W. 860.

4. "The general rule was stated in Newcomb *v.* Boston Protective Dept. 146, 4 Am. St. Rep. 354, 16 N. E. 555, that the plaintiff's unlawful act will prevent his recovery if it directly contributed to his injury. Dudley *v.* Northampton Street Railway Co., 202 Mass. 443, 89 N. E., 23 L. R. A., N. S.

"'In every case which we have been able to examine, where it appears that disobedience to the law directly contributed to the injury, it has been accepted as a perfect defense.' Broschart *v.* Tuttle, 59 Conn. 8. See, also, Newcomb *v.* Protective Department, 146 Mass. 600; Shear. & R. Neg., § 646. While one transgressing the law, he should not be permitted to claim indemnity for an injury from the wrongful act of another, to which his own transgression contributed." Weller *v.* Chicago, etc., R. Co., 120 Missouri, 635, 656.

5. Nager *v.* Hammond, 54 N. Y. App. Div. 532, 67 N. Y. Supp. 63.

thing causing the injury was in the nature of a trap.[6] No one, even to protect himself against trespassers, has a right to erect death-traps on his premises.[7]

Analogy to Contributory Negligence Rule—Relation of Illegal Act to Injury.—The principle that negligence on the part of a person injured contributing to his injury will prevent a recovery is universally accepted, and there seems to be no good ground for distinction in this respect between negligence and any illegal act which is a contributing cause of the injury. It may be easier to determine the effect of negligence in a given case than to determine the effect of an illegal act, and owing to the great number of prohibited acts, especially under city ordinances, cases have frequently arisen where courts have determined that certain illegal acts could not be considered contributory faults, yet the rule applicable to negligence and to illegal acts on the part of the plaintiff is precisely the same. To prevent recovery the negligence in the one case, or the illegal act in the other, must have the relation to the injury of cause to the effect produced. In every case which we have been able to examine, where it appeared that disobedience to the law directly contributed to the injury, it has been accepted as a perfect defense. The application of the general rule depends upon the relation of the statute or ordinance prohibiting certain acts or transactions to the injury. Thus, in the case of the violation of the statute or ordinance by the person injured, it is necessary that the statute or ordinance be intended to prevent such an injury as is the ground for suit, and where it has no relation to the act causing the injury, violation of it will not be a contributory cause.[8] And in addition,

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6. Wilson *v.* Great Southern Tel., etc., Co., 41 La. Ann. 1041, 6 So. 781.

7. "The posts were placed in dangerous proximity to the street, and ordinary prudence, and a due regard for the safety of the public, would have dictated that the guy wires should be placed beyond the possibility of injuring any one. Persons using the streets without any intention of violating the city law, might by accident be driven with a vehicle on the neutral ground. In a case of this kind, it would hardly be considered that he contributed to his own accident if he should be injured by the wire." Wilson *v.* Great Southern Tel., etc., Co., 41 La. Ann. 1041, 6 So. 781, 782.

8. Pennsylvania Co. *v.* Frana, 112 Ill. 398; Sherman *v.* Fall River

the violation of the statute or ordinance must be of itself the proximate cause of the injury,[9] which question is usually for the

Iron Works Co., 5 Allen (Mass.), 213; Corey *v.* Bath, 35 N. H. 530; Hoadley *v.* Int. Paper Co., 72 Vt. 79, 47 Atl. 169. In this latter case the violation of a Sunday law by working or traveling was held not to excuse negligence.

"We do not think that the ordinance had any legitimate bearing on the case, or on the rights or duties of the parties. It was doubtless passed to guard against the destruction of property by fire, and had no reference whatever to the duties of a railroad company, or the rights of an individual who might be employed by anyone who kept lumber in quantity at a place prohibited by the ordinance whose duties might require him to cross the railroad track." Pennsylvania Co. *v.* Frana, 112 Illinois, 398, 406.

9. Munroe *v.* Hartford St. Ry. Co., 76 Conn. 201, 56 Atl. 498; Norris, *v.* Litchford, 35 N. H. 271, 65 Am. Dec. 546; Mineraly *v.* Union Ferry Co., 56 Hun (N. Y.) 113, 9 N. Y. Supp. 104; Clyde Nav. Co. *v.* Barclay, 1 App. Cas. 790, 36 L. T. Rep., N. S. 379; Loomis *v.* Hollister, 75 Conn. 718; Opsahl *v.* Judd, 30 Minn. 126, 14 N. W. 575. See Atlantic Coast Line Ry. Co. *v.* Wier, 63 Fla. 69, 58 South. 641, 41 L. R. A. (N. S.) 307. It is generally held that the statutes requiring automobiles to be licensed are not passed to protect the public, but simply as a license tax imposed for the privilege of using the roads. Hyde *v.* McCreery, 145 App. Div. 729, 130 N. Y. Supp. 269. See the principal case. Hence the failure to have the automobile properly licensed is not considered as having contributed to the injury; and the injured party, if free from contributory negligence, is allowed to recover. Armstead *v.* Lounsberry, 129 Minn. 34, 151 N. W. 542, L. R. A. (1915D), 628; Henning *v.* New Haven, 82 Conn. 661, 74 Atl. 892, 25 L. R. A. (N. S.) 734, 18 Ann. Cas. 240; Crossen *v.* Chicago & J. El. R. Co., 158 Ill. App. 42. See Lindsay *v.* Cecchi, 3 Boyce (Del.) 133, 80 Atl. 523, 35 L. R. A. (N. S.) 699. It will be noticed that laws requiring automobiles to be licensed are analogous to the "Sunday Laws," laws prohibiting travel on Sunday. By the great weight of authority a person could recover for an injury received while traveling on Sunday in violation of these statutes. Philadelphia, etc., R. R. Co. *v.* Towboat Co., 23 How. 209; Mahoney *v.* Cook, 26 Pa. St. 342.

In an action for damages to plaintiff's motor truck from a collision when defendant's automobile overtook and attempted to pass in front of it, evidence held to show that the operation of the truck in violation of an ordinance, in that it was not kept reasonably near the right curb, was not the proximate cause of the collision. House *v.* Fry (Calif.), 157 Pac. 500.

In the case of Minerly *v.* Union Ferry Co., 56 Hun (N. Y.) 113, 9 N. Y. Supp. 104, it was held that the violation of the statute by the

jury.[10]

In actions to recover for injuries not intentionally inflicted but resulting from a breach of duty which another owes to the party injured—commonly classed as actions for negligence—the fact that the plaintiff or defendant at the time of the injury was a law-breaker may possibly be relevant as an incidental circumstance, but is otherwise immaterial unless the act of violating the law is in itself a contributing cause in respect to the injury suffered.[11] If a party is negligently injured on a highway he may have redress, notwithstanding the fact that at the time of the injury he was on the wrong side of the road in violation of the law of the road, provided his being on that side of the road did not contribute proximately to his injury. In the principal case the court held that there was no causal relation between the violation of the statute and the wrong for which the suit was brought; that is to say, the want of a license for the automobile or for the chauffeur could not, by any possibility, have contributed proximately to the happening of the occurrence by which the injury was caused.

What Constitutes Contributory Cause—Conflict of Authorities Stated.—While all, or nearly all, the courts of last resort in the United States that have had the subject under consideration, agree in the legal proposition that any culpable negligence or any illegal act on the part of the plaintiff which essentially contributes to his injury will prevent a recovery, yet there is a

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person injured is not absolute proof of negligence, but merely places on him the burden of proof to show that such violation did not contribute to his injury.

In the case of Berry *v.* Sugar Notch Borough, 191 Pa. St. 345, 43 Atl. 240, it was held that a motorman, who was running his car at a higher rate of speed than allowed by law, when a tree fell down on the car injuring him, was entitled to recover, as his violation of the ordinance was not the proximate cause of the accident, in that if he had been going at the legal rate the tree would have fallen before he arrived at the spot.

10. "Whether or not, under the circumstances of the case, it is the proximate cause, is a question of fact for the jury under proper instructions from the court." Monroe *v.* Hartford Street R. Co., 76 Conn. 201, 208.

11. Monroe *v.* Hartford Street R. Co., 76 Conn. 201, 206.

marked difference in opinion as to what constitutes a contributory cause of injury.

The majority rule, and the better one, is that a contributory cause is one which under the same circumstances would always be an element aiding in the production of the accident. The fact that the traveler is unlawfully at the place of the accident does not contribute to the production of the accident. The same forces and causes would have caused the accident as well one time as another; as well when the traveler was lawfully at the place of the accident as when unlawfully there. Neither can the fact that the party receiving the injury was at the time engaged in an unlawful act deprive him of the right of recovery. If the plaintiff at the time of an injury were profaning the name of the Deity he would have been engaged in an unlawful act.

The difference in the two lines of authorities consists in the assumption by those who support the minority rule that a mere concurrence of the illegal act with the accident in point of time is to be treated as a concurring cause of the injury; it is not, but rather a condition or incident merely.[12] This difference, however, is mostly, if not entirely, confined to cases affected by the plaintiff's violation of the Sunday Law.

Conflict of Authorities Considered and Explained.—There must of course be a fallacy somewhere in the reasoning that can reach opposite results while proceeding upon the same premises. This seeming disagreement in the cases, at first impression, is quite confusing, yet upon more careful scrutiny it will appear that the difference consists, not in the principle adopted, but mostly, if not entirely, in the mode of its application.[13]

"Cause" and "consequence" are correlative terms. One implies the other. When an event is followed in natural sequence by a result it is adapted to produce, or aid in producing, that result is a consequence of the event, and the event is the cause of the result.[14] But there is a distinction between an unlawful act which is, at least, a contributing cause of the accident and one

12. Broschart *v.* Tuttle, 59 Conn. 1, 11 L. R. A. 33, 37; Monroe *v.* Tuttle, 76 Conn. 201, 207.

13. Broschart *v.* Tuttle, 59 Conn. 1, 11 L. R. A. 33, 37.

14. Monroe *v.* Hartford Street R. Co., 76 Conn., 201, 207.

which is merely an attendant circumstance or a condition, though perhaps a necessary condition, of that accident.[15]

The authorities upholding the minority rule hold that a person traveling on Sunday, not from necessity or charity, cannot recover of a town or city for injuries caused by a defective highway or even by the carelessness of another traveler.[16] But in reaching such a result those courts have uniformly assumed that the plaintiff's unlawful act contributed to his injury; while on the other hand the courts of other states following the same rule have reached the opposite result, and have held that the plaintiff in such cases may recover, always giving as among the controlling reasons that the illegal act did not contribute to the injury.[17]

The fallacy of the reasoning in support of the minority rule has, we think, been most ably exposed by the courts of Wisconsin, Maine, Rhode Island, Vermont and New York, and other states.[18] Thus it has been said that to make good the defense it

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15. Broschart *v.* Tuttle, 59 Conn. 1, 11 L. R. A. 33, 39, referring to McCarthy *v.* Morse, 197 Mass. 332, 8 S. E. 1109; Black *v.* New York, N. H. & H. R. Co., 193 Mass. 448, 452, 7 L. R. A. (N. S.) 148, 79 N. E. 797, 9 A. & E. Ann. Cas. 485; Biggio *v.* Boston, 179 Mass. 356, 60 N. E. 938; Dudley *v.* Northampton Street Railway Co., 202 Mass. 443, 89 S. E. 25, 23 L. R. A., N. S.

"In other words, the trespass of the plaintiff was simply an act contributory to the accident. It was not that negligence contributory to the accident which always defeats a recovery." Magar *v.* Hammond, 54 App. Div. 532, 67 N. Y. Supp. 63, 68.

16. Bosworth *v.* Swansey, 10 Met. 363; Jones *v.* Andover, 10 Allen 18; Feital *v.* Middlesex R. Co., 109 Mass. 398; Smith *v.* Boston & M. R. Co., 120 Mass. 490; Cratty *v.* Bangor, 57 Me. 423.

17. Broschart *v.* Tuttle, 59 Conn. 1, 11 L. R. A. 33, 37; Monroe *v.* Hartford, etc., R. Co., 76 Conn. 201, 207.

18. In the case of United Transportation Co. *v.* Hass, 155 N. Y. Supp. 110, the plaintiff's automobile, while not registered as required by law, was injured by the collision of the defendant's automobile, which was being driven in a careless and reckless manner. It was held that the plaintiff could recover.

"There is a conflict of authorities on this subject, but the view adopted by the weight of authority is against the contention of the defendant. This view accords with reason and the general principles of the law applicable to torts. The fact that the decedent was working for the defendant on Sunday can not be said to be, either

must appear that a relation existed between the act or violation of law on the part of the plaintiff, and the injury or accident of which he complains, and that relation must have been such as to have caused, or helped to cause, the injury or accident, not in any remote or speculative sense, but in the natural and ordinary course of events, as one event is known to precede or follow another.[19] The violation of a Sunday Law against travel is not of itself an act, omission or fault, with reference to a defective bridge, over which a traveler may be passing, unlawfully though it may be, because the violation of such a law has no tendency to cause it. All other conditions remaining the same, the same accident would have happened on any other day, or if the traveler was at the time on an errand of necessity or mercy.[20] The fact that a party plaintiff was at the time of the injury passing another wayfarer on the wrong side of the street, or without giving him half the road, or that he was traveling on runners with-

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in law or in fact, contributory negligence concurring to produce the injury, nor the proximate cause of it. This view is recognized in Johnson *v.* Irasburgh, 47 Vt. 32, which was decided on the ground that the town was not bound to maintain its highway for use by the plaintiff for an unlawful purpose. Holcomb *v.* Banby, 51 Vt. 435, cited by defendant, was decided on the same ground. Duran *v.* Insurance Co., 63 Vt. 440, 22 Atl. 530, 13 L. R. A. 637, turned upon the terms of the contract on which plaintiff claimed to recover. The court below, without submitting the question of proximate cause to the injury, should have held that it was no defense to defendant's negligence that the decedent was working for it on Sunday when its negligence caused his death. Baldwin *v.* Barney, 12 R. I. 392, 34 Am. Rep. 670; Sutton *v.* Town of Wauwatosa, 29 Wis. 21, 9 Am. Rep. & B. Portland, 58 Me. 199, 4 Am. Rep. 274; Philadelphia, W. & B. R. Co. *v.* Philadelphia & H. de G. Steam Towboat Co., 23 How. 209, 16 L. Ed. 430; Platz *v.* City of Cohoes, 89 N. Y. 219, 42 Am. Rep. 286; Railway Co. *v.* Buck, 116 Ind. 566, 19 N. E. 453, 9 Am. St. Rep. 883; Schmid *v.* Humphrey, 48 Iowa, 652, 30 Am. Rep. 414; Boydon *v.* Railroad Co., 70 Vt. 125, 39 Atl. 771." Hoadley *v.* International Paper Co., 72 Vt. 79, 47 Atl. 169, 170.

19. In Sutton *v.* Wauwatosa, 29 Wis. 21, the plaintiff was driving his cattle to market on Sunday in violation of the statute, when they were injured by the breaking down of a defective bridge, which the defendant town was bound to maintain. The defense was the plaintiff's own illegal act.

20. Broschart *v.* Tuttle, 59 Conn. 1, 11 L. R. A. 33, 38.

out bells in contravention of the statute, or that he was smoking a cigar in the street in violation of a municipal ordinance, while it might subject the offender to a penalty, will not excuse the town for a neglect to make its ways safe and convenient for travelers, if the commission of the plaintiff's offence did not in any degree contribute to produce the injury of which he complains.[21]

The logic of the minority rule, if any there be, is that a person who receives an injury while traveling contributes to that injury by the act of traveling, and that he is therefore bound to show his right to travel in order to show that his own fault did not concur in causing the injury. The fallacy of this position may be shown by many arguments and pertinent illustrations, to the effect that in such cases the injury must be regarded as a mere incident or concomitant of the traveling and not its effect.[22] In regard to traveling contrary to the law it may be said that if the person injured had obeyed the law and remained at home and not traveled, the accident would not have happened. That is not enough. It must appear that the disobedience contributed to the accident, or that the statute created a right in the defendant which it could enforce. But if the object of the statute is the promotion of public order and not the advantage of individuals, the traveler is not a trespasser upon the streets, nor has the defendant a right to close it against such traveler. In such an action the fault which prevents a recovery is one which directly contributes to the accident. It may doubtless be said that

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21. The case of Baker *v.* Portland, 58 Me. 199, did not arise under the Sunday Law, but the plaintiff was injured by a defect in the highway while driving at a rate of speed prohibited by the village ordinance, and the judgment in favor of the plaintiff was sustained expressly upon the ground that the jury had found that the fast driving did not contribute to the injury.

22. "Broschart *v.* Tuttle, 59 Conn. 1, 11 L. R. A. 33, 38.

In Baldwin *v.* Barney, 12 R. I. 392, where it was held that a person illegally traveling on Sunday along a highway could recover against one who recklessly caused a collision and consequent injury to the plaintiff.

In the case of Platz *v.* Cohoes, 89 N. Y. 219, it was held that where, through the culpable omission of duty on the part of a city, a street had become so obstructed that a traveler was thereby injured, it was no defense that the accident happened on Sunday and that the plaintiff at the time was traveling contrary to the Sunday Law."

if the plaintiff had not traveled he would not have been injured; and this will apply to nearly every case of collision or personal injury from the negligence or wilful act of another, but the act of travel is not one which usually results in injury. It therefore cannot be regarded as the immediate cause of the accident, and of such only the law takes notice.[23]

It may be said however that in some other cases than those affected by Sunday Laws the courts of Massachusetts and other states have discriminated and applied the principle of contributory fault in strict accordance with the distinction we have suggested.[24]

Theory That Transgressor Not within Protection of Law.

The other theory is that the mere fact that a party injured was, at the time, violating the law puts him out of the protection of the law; that he is put by the law at the mercy of others.[25] Thus it is said that as the plaintiff was violating a law made for de-

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23. Broschar *v.* Tuttle, 59 Conn. 1, 11 L. R. A. 33, 39.

24. In Welch *v.* Wesson, 6 Gray, 505, where two persons were racing contrary to law, and one of them negligently injured the other, it was held the injured party could recover, because his own illegal act did not contribute to his injury. So where the plaintiff's team was standing in a street in a manner prohibited by statute, and was carelessly run into by the defendant, a recovery was sustained upon the same ground. Steele *v.* Burkhardt, 104 Mass. 59.

"In Gregg *v.* Wyman, 4 Cush, 322, it was decided there was error in holding a plaintiff's illegal conduct to be an essential element of his case, when in fact it was merely incidental to it."

25. As to the Massachusetts doctrine, see the cases of Com. *v.* Kingsberry, 199 Mass. 542, 85 N. E. 848, L. R. A. 1915E, 264, 127 Am. St. Rep. 513; Dudley *v.* Northampton St. R. Co., 202 Mass. 443, 89 N. E. 25, 23 L. R. A., N. S., 561; Banks *v.* Highland Street R. Co., 136 Mass. 485; Newcomb *v.* Boston Protective Dept., 146 Mass. 596, 600, 4 Am. St. Rep. 354 et seq., 16 N. E. 555; Dudley *v.* Northampton Street R. Co., 202 Mass. 443, 89 N. E. 25, 23 L. R. A., N. S.

"The legislature, in the opinion of a majority of the court, intended to outlaw unregistered machines, and to give them, as persons lawfully using the highways, no other right than that of being exempt from reckless, wanton, or wilful injury. They were to be no more travelers than is a runaway horse. Richards *v.* Enfield, 13 Gray, 344 Higgins *v.* Boston, 148 Mass. 484, 20 N. E. 105." Dudley *v.* Northampton Street R. C., 202 Mass. 443, 89 N. E. 25, 23 L. R. A., N. S.

fendant's protection against him, he was a trespasser as to the defendant, who was lawfully using the highway, and the defendant owed to the plaintiff no other or further duty than that which it would owe to any trespasser upon its property; that is, not the duty of ordinary care, as those words are commonly used, but merely the duty to abstain from injuring him by wantonness or recklessness.[26] Of course the defendant would have had no right to run its car into the plaintiff's machine wantonly or recklessly; and that is the point in a great many cases.[27]

This theory is based on the assumption that illegal conduct of a plaintiff contributing to the occurrence on which his action is founded is an exception to the general rule that, in deciding a question in relation to negligence, each element which enters as a factor into one's act to give it character is to be considered in connection with every other, and the result is reached by considering all together. Such illegality may be viewed in either of two aspects. Looking at the transaction to which it pertains as a whole, it may be considered as a circumstance bearing upon the question whether there was actual negligence; or looking at it simple in reference to the violated law, the act may be tried solely by the test of that law. In the latter aspect it wears a hostile garb, and an inquiry is at once suggested whether the plaintiff, as a transgressor of the law, is in a position to obtain relief at the hands of the law. In the first view, the illegal conduct comes within the general rule just stated. In the second it does not. This distinction has not always been observed." [28]

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26. Sullivan *v.* Boston, etc., R. Co., 109 Mass. 73, 76, 21 L. R. A., N. S., 36, 84 N. E. 844; Fitzmaurice *v.* New York, N. H. & H. R. Co., 192 Mass. 159, 162, 6 L. R. A., N. S., 1146, 116 Am. St. Rep. 236, 78 N. E. 418, 7 A. & E. Ann. Cas. 586; Massell *v.* Boston Elev. R. Co., 191 Mass. 491, 493, 78 N. E. 108; Dudley *v.* Northampton Street R. Co., 202 Mass. 443, 89 N. E. 25, 23 L. R. A., N. S.; Dudley *v.* Northampton St. Ry. Co., 202 Mass. 443, 89 N. E. 25, 23 L. R. A., N. S., 561; Deane *v.* Boston Elevated Ry. Co., 217 Mass. 495, 105 N. E. 616.

27. See Welch *v.* Wesson, 6 Gray 505; McKeon *v.* New York, etc., R. Co., 183 Mass. 271, 97 Am. St. Rep. 437, 67 N. E. 329; Dudley *v.* Northampton Street R. Co., 202 Mass. 443, 87 N. E. 25, 23 L. R. A., N. S., 561.

28. Brosehart *v.* Tuttle, 59 Conn. 1, 11 L. R. A. 33, 40.

"The majority of the authorities however hold that in doing an unlawful act a person does not necessarily put himself outside the protection of the law. He is not barred of redress for an injury suffered by himself, nor liable for an injury suffered by another, merely because he is a lawbreaker."[29]

The main reason used as showing the fallacy of the theory that the plaintiff has placed himself beyond the protection of the law, is that a law prohibiting a particular thing exhausts itself in the penalty prescribed, and that to give it further effect by forfeiting the plaintiff's rights of action would be in effect adding to that penalty. The courts may not add to the penalty imposed by a statute a forfeiture of the right of indemnity for an injury resulting from the defendant's negligence where the violation of the statute cannot be regarded as the immediate cause of the injury.[30]

The entire force of this reasoning consists in its connection with the fact last stated, which manifestly is the only foundation that can support it as a rule of law. It is only upon the assumption that the plaintiff's illegal act does not contribute to his injury that you can add to the penalty by denying a right of action for the injury, for one must first have a right of action before he can forfeit it. A man cannot lose what he has never had in fact or in right. Where the plaintiff's illegal act contributes to his injury he has no right of action whatever, and by so holding nothing is added to the prescribed penalty. It is plain then that the principal cannot be applied to any case except to the one expressly stated, or one like it, that is, where the plaintiff's act had not contributed to his injury.

"The real principle is the same, whether the plaintiff was the sole author of his injuries or whether his illegal act or fault combined with that of the defendant to produce them, for, in such case, it is impossible to apportion the damages or to determine the relative responsibility of the parties, or whether the plaintiff would have been injured at all except for his own contribution to the result." [31]

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29. Monroe *v.* Hartford Street R. Co., 76 Conn. 201, 206.
30. Broschart *v.* Tuttle, 59 Conn. 1, 11 L. R. A. 33, 39.
31. Broschart *v.* Tuttle, 59 Conn. 1, 11 L. R. A. 33, 39.

Theory of Absence of Legal Duty.

There is another line of cases which, while holding with the courts upholding the minority rule considered above, that a person traveling in violation of a statute cannot recover of a town or municipality for an injury sustained by reason of a defect in the highway, places the decision upon a radically different ground, namely, that the town is under no legal duty to furnish a safe highway to travel upon when at that precise time the person was forbidden by law to travel over the highway, and owing no duty to him they could not be liable for any neglect. This position is sustained by strong arguments and by a reliance on many cases analogous in principle. This may be true with reference to that particular class of cases and the minority rule cases right in result and wrong simply in the reasons given in their support. But whether this is true or not it shows that the reasoning that supports the minority rule in this class of cases is wrong, and establishes the true principle and distinction in regard to illegal acts of a plaintiff that will prevent him from recovering for injuries received.[32]

Statutory Regulation.

In some cases the law is so changed as to provide that no recovery shall be had by the owner of a motor vehicle not legally registered, for any injury to person or property received by reason of the operation of such motor vehicle. And under such a law it has been held that an automobile owner, who had falsely registered the car under a name not his own, could not recover for injuries thereto, while standing in the highway opposite a hotel, by being negligently driven into by a motor truck; the word "operation" including such stops as motor vehicles ordinarily make, while the words "received by reason of the operation" do not refer merely to injuries proximately caused by such operation.[33]

R. C. WALKER.

Charlottesville, Va.

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32. Johnson *v.* Irasburgh, 47 Vt. 28.

33. Stroud *v.* Board of Water Com'rs of City of Hartford (Conn.), 97 Atl. 336.